

HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

MOTOROLA, INC., et al.,

Defendants.

No. C10-1823-JLR

MICROSOFT'S 3/28/12 MOTION TO
FILE DOCUMENTS UNDER SEAL

NOTED FOR:
Friday, April 20, 2012

MOTOROLA MOBILITY, INC., et al.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

I. RELIEF REQUESTED

Pursuant to Local Civil Rule 5(g) and paragraphs 2(a) and 8 of the protective order entered in this case, Microsoft respectfully seeks leave to file under seal the following documents:

- (1) Limited portions of the Declaration of Peter Chrocziel submitted in support of Microsoft's Motion for TRO and Preliminary Injunction (the "Chrocziel Declaration"), including the entirety of Exhibit 1 thereto;

MICROSOFT'S 3/28/12 MOTION TO FILE
DOCUMENTS UNDER SEAL - 1

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(2) Limited portions of the Declaration of Josh Hutto submitted in support of Microsoft's Motion for TRO and Preliminary Injunction (the "Hutto Declaration");

(3) Limited portions of the Declaration of Marcelo Prieto submitted in support of Microsoft's Motion for TRO and Preliminary Injunction (the "Prieto Declaration"); and

(4) Limited portions of Microsoft's Motion for a Temporary Restraining Order and Preliminary Injunction (the "Motion for TRO and Preliminary Injunction").

Microsoft seeks to file the foregoing materials under seal because they contain references to, and descriptions of, confidential and sensitive business information, including but not limited to information relating to the potential commercial consequences resulting from Motorola's efforts to exclude certain Microsoft products from the German market. There is a significant risk that Microsoft may suffer harm, including vis-à-vis Microsoft's competitors, should this information be disclosed publicly.

For these reasons, and as more fully described below, Microsoft respectfully requests permission to file limited portions of the above-referenced documents under seal. Microsoft is filing redacted versions of each document contemporaneously herewith. Compelling reasons exist for protecting the confidentiality of these documents by permitting the filing of complete and unredacted versions of each document under seal.

II. FACTS & AUTHORITY

A. The Operative Protective Order and Applicable Court Rules Permit Microsoft to File Its Confidential Information under Seal.

Pursuant to the Protective Order, Microsoft is permitted to file Confidential Business Information¹ or other trade secrets under seal. Paragraphs 2(a) and 8 of the Protective Order govern the filing of documents under seal. Paragraph 2(a) provides:

¹ "Confidential Business Information" is defined in the parties' Protective Order as "information which has not been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, amounts or source of any income, profits, losses, or expenditures." Protective Order Regarding the Disclosure and Use of Discovery Materials (ECF No. 72), ¶1.

Any information submitted in pre-trial discovery or in a pleading, motion, or response to a motion in this action, either voluntarily or pursuant to order, and which is asserted by a supplier to contain or constitute Confidential Business Information shall be so designated by such supplier in writing...and shall be segregated from other information being submitted. Documents shall be clearly and prominently marked on their face with the legend: “[SUPPLIER’S NAME] CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER” or a comparable notice. During the pre-trial phase of this action, such information, whether submitted in writing or in oral testimony, shall be disclosed only *in camera* before the Court and shall be filed only under seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District Court for the Western District of Washington.

Paragraph 8 likewise provides that:

Any Confidential Business Information submitted to the Court in connection with a motion or other proceeding within the purview of this action shall be submitted under seal pursuant to paragraph 2 above.

Id., at ¶ 8.

The Federal Rules of Civil Procedure recognize that courts may permit parties to file “trade secrets or other confidential research, development, or commercial information” under seal. Rule 26(c)(1)(G) and (H). District courts “are in the best position to weigh the fairly competing needs and interests of the parties affected by discovery,” in crafting the appropriate treatment of documents for which protected treatment is requested. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General Motors Corp.*, 307 F.3d 1206, 1211-1212 (9th Cir. 2002).

Additionally, pursuant to Local Rule CR 5(g)(2), the Court may, for “good cause under Rule 26(c),” seal a document attached to a nondispositive motion. The Court may likewise seal a document filed in support of a dispositive motion upon a “compelling showing that the public’s right of access is outweighed by the interests of the public and the parties in protecting the court’s files from public review.” *Id.*; *see also Kakakama v. City and Cnty of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). The Ninth Circuit has not ruled on whether a motion for preliminary injunction is dispositive or non-dispositive for purposes of sealing court records, and district courts

1 in this Circuit are split on the issue. *Compare Selling Source, LLC v. Red River Ventures, LLC*,
 2 2011 U.S. Dist. LEXIS 49664 (D. Nev. Apr. 29, 2011) (finding that preliminary injunction
 3 motions are dispositive for purposes of moving to seal) and *In re Nat'l Sec. Agency*
 4 *Telecomms., Records Litig.*, 2007 U.S. Dist. LEXIS 14473 (N.D. Cal. Feb. 20, 2007) (finding
 5 that preliminary injunction motions are nondispositive). Here, even under the heightened
 6 “compelling showing” standard, Microsoft has made the requisite showing.

7 In determining whether compelling reasons exist, the Court weighs relevant factors such as
 8 “the public interest in understanding the judicial process and whether disclosure of the material
 9 could result in improper use of the material for scandalous or libelous purposes or infringement
 10 upon trade secrets.” *Dish Network, L.L.C. v. Sonicview USA, Inc.*, 2009 U.S. Dist. LEXIS 73857,
 11 *2-3 (S.D. Cal. Aug. 20, 2009), citing *Pintos v. Pac. Creditors Ass’n*, 565 F.3d 1106, 1115, 1116
 12 n.6 (9th Cir. 2009). Where the material sought to be sealed “includes information about
 13 proprietary business operations, a company’s business model or agreements with clients, there
 14 are compelling reasons to seal the material because possible infringement of trade secrets
 15 outweighs the general public interest in understanding the judicial process.” *Selling Source,*
 16 *LLC*, 2011 U.S. Dist. LEXIS 49664, at *18.

17 Further, while the public generally enjoys a right to inspect and copy public records, “it
 18 is uncontested ... that the right to inspect and copy judicial records is not absolute. Every court
 19 has supervisory power over its own records and files, and access has been denied where court
 20 files might have become a vehicle for improper purposes.” *Nixon v. Warner Communications,*
 21 *Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306 (1978). As the Court recognized, one such “improper
 22 purpose” is where the commercial business information at issue is sought to be used as a
 23 “source[] of business information that might harm a litigant’s competitive standing.” *Id.*
 24 (denying access to copies of tapes played at trial and noting that courts refused public access to
 25 their files where granting such access might “become a vehicle for improper purposes,”

1 including causing a litigant competitive harm). Compelling reasons exist to grant Microsoft's
2 motion to seal.

3 **B. Compelling Reasons Exist for Filing and Maintaining under Seal Documents that**
4 **Disclose Non-Public and Commercially Sensitive Information.**

5 As set forth in greater detail in Microsoft's Motion for TRO and Preliminary
6 Injunction, in early July 2011, Defendant General Instrument Corp., a wholly-owned
7 subsidiary of defendant Motorola Mobility, Inc., filed certain patent infringement actions
8 against Microsoft and its affiliates in a court located in Mannheim, Germany (the "German
9 Actions"). *See* Chrocziel Declaration, ¶¶ 2-5.

10 By way of the German Actions, General Instrument seeks to exclude certain Microsoft
11 products from the German market that support the H.264 standard. *Id.*, ¶ 6. The Mannheim
12 Court is scheduled to enter its final order on April 17, 2012. *Id.*, ¶ 21. At that time, the Court
13 may enter an order that will, upon the posting of an appropriate bond by General Instrument,
14 preclude Microsoft and its affiliates from (a) offering, distributing, using or importing the
15 Xbox 360 game console in Germany and (b) offering or supplying its software products that
16 support decoding according to the H.264 standard in Germany, including Microsoft's
17 Windows 7 operating system software (the "German Order"). *Id.*, ¶ 22. Any such relief
18 ordered by the Mannheim Court will not be self-executing; General Instrument must take
19 affirmative steps before such an order can take effect, including the posting of security in the
20 event the Mannheim Court's decision is reversed on appeal. *Id.*, ¶ 23.

21 The materials that Microsoft seeks to seal by way of this Motion include confidential
22 business and market-based information, including references to and descriptions of the
23 commercial harm that would be avoided if Motorola were prevented from taking steps to
24 effectuate the German Order during the pendency of this action. Compelling reasons exist to
25 maintain the confidentiality of this non-public and commercially sensitive information.

1. The Chrocziel Declaration Contains Confidential Information that Should be Sealed.

The redacted information contained in the Chrocziel Declaration is highly confidential and commercially sensitive. It includes a description of confidential and non-public licensing terms associated with the so-called “Orange Book” offer Microsoft presented to Motorola on December 23, 2011. *See* Chrocziel Declaration, ¶¶ 12-15. Microsoft also is seeking to file under seal the entirety of Exhibit 1 to the Chrocziel Declaration, which consists of Microsoft’s Orange Book offer to Motorola. The terms of Microsoft’s Orange Book offer may be of interest to Microsoft’s competitors and there is a serious risk that public disclosure would result in competitive harm to Microsoft. There are no significant countervailing reasons why commercial licensing information of the type contained in Exhibit 1 should be disclosed to the general public. Accordingly, compelling reasons exist to maintain the confidentiality of this information by allowing Microsoft to file a complete and unredacted version of the Chrocziel Declaration under seal.

2. The Hutto and Prieto Declarations Contain Confidential Information that Should Be Sealed.

The redacted information contained in the Hutto Declaration and Prieto Declaration is highly confidential and commercially sensitive. The Hutto Declaration includes commercially sensitive information relating to Microsoft’s Xbox 360, the Xbox 360’s market share in the German market, and Microsoft’s marketing efforts directed to the German market. The Prieto Declaration includes commercially sensitive information relating to Microsoft’s various licensing programs in the German market, including programs relevant to Microsoft’s licensing of its Windows 7 operating system software. The Declarations include descriptions of potential commercial impacts that may result from Motorola’s efforts to exclude Microsoft products from the German market, by way of the German Actions. The public disclosure of this information would create an unnecessary and unreasonable risk of commercial or

1 competitive harm to Microsoft without any serious countervailing justification for the general
2 public's access to such information. This is particularly true with respect to the Xbox, in light
3 of the intense competition within the German game console market, currently dominated by
4 Microsoft and its two main rivals, Nintendo and Sony.

5 Accordingly, Microsoft seeks to file both the Hutto and Prieto Declarations under seal
6 because they both contain sensitive commercial information not generally known to the public
7 or Microsoft's competitors. Compelling reasons exist to protect the confidentiality of such
8 information by allowing Microsoft to file complete and unredacted versions under seal.
9 Redacted versions of both declarations are being publicly filed.

10 3. Microsoft's Motion for TRO and Preliminary Injunction Contains Confidential
11 Business Information that Should Be Sealed.

12 Microsoft's Motion for TRO and Preliminary Injunction likewise contains confidential
13 business information that should be sealed. This confidential information is generally based on
14 and derived from the non-public and sensitive commercial information contained in the
15 Chroczel, Hutto and Prieto Declarations, as described above. The redacted portions of
16 Microsoft's Motion for TRO and Preliminary Injunction should be maintained under seal for
17 the same reasons that the redacted confidential and commercially sensitive portions of the
18 underlying declarations should be sealed. Compelling reasons exist to treat the non-public and
19 commercially sensitive information in the Motion for TRO and Preliminary Injunction in the
20 same manner as such information is treated in the underlying declarations. A redacted version
21 of the Motion is being filed as part of the public record.

22 Microsoft has attempted to limit the amount of sealed information to the minimum
23 necessary to protect its non-public and commercially sensitive information. Microsoft is
24 seeking to file under seal only those limited portions of the above-referenced documents that
25

1 contain information that should be protected from public disclosure under the governing
2 standards outlined above.

3 **III. CONCLUSION**

4 Microsoft has filed limited portions of the above-referenced documents under seal
5 based on its good faith belief that such material qualifies for protection under the terms of the
6 Protective Order and applicable Court rules. For the foregoing reasons, Microsoft respectfully
7 requests permission to file limited portions of the Declarations of Peter Chrocziel, Josh Hutto
8 and Marcelo Prieto under seal, as well as those portions of Microsoft's TRO and Preliminary
9 Injunction Motion that rely on these declarations and/or otherwise disclose non-public and
10 confidential business information of a similar nature. Microsoft is filing redacted versions of
11 all four documents as part of the public record. A [Proposed] Order Granting Microsoft's
12 3/28/12 Motion to File Documents Under Seal has been submitted herewith.

13 DATED this 28th day of March, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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